U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	: DECISION OF THE
	: VICE COMMANDANT
vs.	:
	: ON APPEAL
LICENSE NO. 659384 and MERCHANT MARINER'S DOCUMENT NO. 569-58-5167-D1	: NO. 2566
Issued to: Michael L. WILLIAMS, Appellant	:

This appeal has been taken in accordance with 46 U.S.C.

§ 7702 and 46 C.F.R. § 5.701.

By order dated 1 December 1992, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended Appellant's license and document for the period 6 May 1992 to 21 August 1992 (during which period both had been voluntarily deposited with the Coast Guard per 46 C.F.R.

§ 5.105(c)), plus an additional three months' suspension remitted on twelve months probation, upon finding proved a charge of misconduct. The three specifications supporting the charge alleged that Appellant permitted an unqualified and unlicensed individual to assume direction and control of the M/V SEA VIKING, in violation of 46 U.S.C. § 8904(a); failed to

take adequate

precautions in an overtaking situation to avoid a collision with F/V LEVIATHAN, a violation of 33 U.S.C. § 1602; and failed to take early and substantial action to keep well clear of

F/V LEVIATHAN, a violation of 33 U.S.C. § 1602.

Following a prehearing conference on 28 July 1992, a hearing was held at Seattle, Washington on 20 and 21 October 1992. Appellant appeared at the prehearing conference and hearing with professional counsel by whom he was represented throughout the proceedings.

Appellant denied the charge and all specifications as provided in 46 C.F.R. § 5.527. The Investigating Officer introduced into evidence two exhibits and the testimony of four witnesses. Appellant introduced a total of seven exhibits and the testimony of three witnesses including the respondent himself. In addition, the Investigating Officer and Appellant's counsel agreed to a stipulation of facts (Agreed Exhibit 1).

Following the hearing, the Administrative Law Judge rendered a decision in which he found that the charge and three specifications were proved. His written decision and order were entered on 1 December 1992, and were served on Appellant's counsel on 15 December 1992. Through his counsel, Appellant filed notice of appeal on 22 December 1992. Appellant received a transcript of the proceedings on 5 January 1993. The appeal was perfected by filing a completed brief on 3 March 1993, within the filing requirements of 46 C.F.R. § 5.703. A Petition to Reopen Hearing, filed by Appellant on 20 July 1993, was withdrawn on

3 December 1993. Accordingly, this appeal is properly before me for review.

Appearance: Shane C. Carew, Attorney for Appellant, Carew Law Office, 1218 Third Avenue, Suite 1808, Seattle, Washington, 98101, (206) 587-0590.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of the license and document captioned above, which were issued to him by the United States Coast Guard.

On March 20, 1993, Appellant was serving as Operator aboard the M/V SEA VIKING, O.N. 568790, under the authority of Coast Guard issued License No. 659384 while the vessel was underway en route to Seattle, Washington via Admiralty Inlet. The M/V SEA VIKING is an uninspected U.S. towing vessel, 118.7 feet long. The M/V SEA VIKING was proceeding on autopilot in the vessel traffic lanes on a course of between 160 and 165 degrees true, at a speed of between nine and nine-and-a-half knots.

After coming on watch at about 11:40 a.m., Appellant asked Raymond Webb, an unlicensed deckhand, to come to the wheelhouse so that Appellant might make a head call. A short time later Webb reported to the wheelhouse as requested.

The F/V LEVIATHAN, a 56 foot uninspected U.S. fishing vessel, was about 100 to 250 yards away from the M/V SEA VIKING. The

F/V LEVIATHAN was also southbound in the vessel traffic lanes. The F/V LEVIATHAN's bearing was about 070 relative from the

M/V SEA VIKING, which was overtaking the F/V LEVIATHAN at the time Appellant called Webb to relieve him. The F/V LEVIATHAN was also traveling on autopilot at a speed of approximately 8 knots. Prior to leaving the wheelhouse, Appellant pointed out the

F/V LEVIATHAN to the deckhand, Webb.

The head on the M/V SEA VIKING is located approximately 10-15 feet from the wheelhouse, aft of the wheelhouse's rear bulkhead. Appellant absented himself from the wheelhouse and controls of the M/V SEA VIKING for approximately three minutes. At approximately 12:20 p.m., while Appellant was in the head, the M/V SEA VIKING collided with the F/V LEVIATHAN. The

F/V LEVIATHAN sank with no loss of life. At the time of the collision, the weather was sunny with fair weather clouds, seas 1-2 feet, unlimited visibility and a diminishing ebb tide.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant urges that the order be reversed and charges be dismissed. Appellant's bases of appeal are as follows:

I. The Coast Guard did not have jurisdiction over the Appellant because the M/V SEA VIKING was not a "towing vessel" under 46 U.S.C. 8904(a).

II. Appellant was denied due process by placing Appellant in the position of having to violate one of two Coast Guard regulations so he could go to the head.

III. Interrogation by the Administrative Law Judge was excessive.

IV. Appellant was denied due process by the Coast Guard's delay in filing the charge, scheduling the hearing, and not timely deposing Frederickson, the helmsman of the F/V LEVIATHAN.

V. Appellant was denied due process by the Administrative Law Judge's refusal to admit a deposition of Michael Frederickson, helmsman of the F/V LEVIATHAN.

VI. The Coast Guard provided no credible evidence or testimony that Appellant failed to take adequate precautions in an overtaking situation in violation of 33 U.S.C. § 1602, Rule 13. (Specification 2)

VII. The Coast Guard provided no credible evidence or testimony that Appellant "failed to take early and substantial action to keep clear" of the F/V LEVIATHAN in violation of 33 U.S.C. § 1602, Rule 16. (Specification 3)

VIII. The Administrative Law Judge erred in not presuming that Frederickson, the helmsman of the F/V LEVIATHAN, was intoxicated at the time of the incident.

IX. The Administrative Law Judge violated Coast Guard regulations and due process by subpoenaing Appellant's employment record and considering it.

X. The Administrative Law Judge erred in ordering an excessive penalty.

XI. The Administrative Law Judge erred in admitting in evidence Coast Guard Exhibit A, a Coast Guard Law Bulletin.

XII. The Administrative Law Judge erred in admitting Coast Guard Exhibit B, the drug screening test of Frederickson, the helmsman of the F/V LEVIATHAN, which was not taken in a timely fashion in accordance with Coast Guard regulations.

XIII. The Administrative Law Judge erred in not allowing Appellant to cross-examine David Olsen, the owner of the F/V LEVIATHAN, regarding his bias and potential interest in the outcome of the Coast Guard hearing.

XIV. The Administrative Law Judge erred in failing to take judicial notice of the magnetic effect of the M/V SEA VIKING's hull upon the F/V LEVIATHAN auto compass.

OPINION

A preliminary matter in this case concerns Appellant's attachment of exhibits to the appeal brief that do not appear to have been presented at the hearing. Appellant has attached three exhibits to his Memorandum in Support of Appeal from Decision of Administrative Law Judge, namely:

Exhibit A, "Excerpts from Fishing Vessel Safety and Beating the Odds in the North Pacific", apparently consisting of 12 pages copied from that publication.

Exhibit B, comprising two letters, one apparently in reply to the other. The first is a letter dated September 8, 1992 addressed to the Investigating Officer. The second is a letter signed by the Investigating Officer, numbered 16700 and dated

29 October 1992, but with the addressee's name blocked out.

Exhibit C, a Declaration of Mr. Norm Davis.

There is no indication that these documents were submitted as evidence at the hearing, or even marked for identification. The regulations governing appeals in these proceedings state, in pertinent part, that the hearing transcript, together with all papers and exhibits filed, shall constitute the record for decision on appeal. 46 C.F.R. § 5.701. Therefore, the three items above are not part of the hearing record and will not be considered on appeal.

I

A

Appellant first contends that the Coast Guard lacked jurisdiction. He appeals the Administrative Law Judge's finding that the M/V SEA VIKING was a "towing vessel" under 46 U.S.C.

§ 8904. He further contends that since it was not a "towing vessel," it did not require a licensed operator, and that, therefore, the Coast Guard lacked jurisdiction over the Appellant. I disagree.

The Coast Guard has jurisdiction to suspend or revoke a seaman's license or merchant mariner's document for acts of misconduct occurring while the seaman is acting under the authority of the license or merchant mariner's document.

46 U.S.C. § 7703. Appeal Decision 2104 (BENSON). One acts under

the authority of a license whenever holding such a license is required by law or regulations, or is required in fact, as a condition for employment. 46 C.F.R. § 5.57.

There is substantial evidence in the record to support the Administrative Law Judge's determination that Appellant was required by 46 U.S.C. § 8904(a) to have a license to operate the M/V SEA VIKING. The Coast Guard's first witness, Mr. Allan H. Anderson, was a manager (port captain) for Crowley Maritime Services, owner of the M/V SEA VIKING. Captain Anderson testified that the M/V SEA VIKING was one of the company's "ROBIN-Class" tugs, used for offshore and outside towing, ship assists in harbor, and to tow petroleum barges. Tr. at 48. Thus, the M/V SEA VIKING is a towing vessel. That she is over 26' in length is clear from the Certificate of Documentation (Attachment to Agreed Exhibit 1) which states the length as 118.7'. Finally, the M/V SEA VIKING was employed as a towing vessel on the day in question (Captain Donald Engblom, master of the M/V SEA VIKING, testified that the M/V SEA VIKING was running for Seattle after assisting a tanker to dock in Cherry Point (Tr. at 86, 112)). The findings of the Administrative Law Judge will not be disturbed unless they are without support in the record or are inherently incredible; that is certainly not the case here. Appeal Decisions 2545 (JARDIN), 2424 (CAVANAUGH), 2423 (WESSELS).

Even without such evidence, the record supports an assertion of jurisdiction under the "condition of employment" test.

46 C.F.R. § 5.57(a)(2). Under that test, one is acting under the authority of a license where the employer requires possession of

the license to serve aboard the vessel. Appeal Decisions 2497 (GUIZZOTTI), 2411 (SIMMONS) and 1131 (OUGLAND). Captain Anderson (supra) testified that the company required Coast Guard licenses of all its masters **and mates**. [emphasis added] Tr. at 49. Appellant's counsel and the Investigating Officer agreed to several stipulations of fact. One of those stipulations is:

> . . .
> 2. That on 20 March 1992, the Respondent [Michael L. Williams] was employed by Crowley Maritime Corp. **as a mate** aboard the M/V SEA VIKING, O.N. 568790. [emphasis added]
> . . .

(Agreed Exhibit No. 1). This stipulation serves to admit the facts of employment, capacity, and qualification that support a finding that Appellant was acting under authority of his license.

The record shows that the owner of the M/V SEA VIKING required mates to be licensed and that Appellant was employed by Crowley and serving aboard the M/V SEA VIKING as mate. These facts establish a fortiori that Appellant was acting under the authority of his operator's license. See Commandant v. Rivera, NTSB Order EM-77 (1979), aff'g Appeal Decision 2126 (RIVERA).

B

The first specification under the charge of misconduct alleged that Appellant violated the provisions of 46 U.S.C.

§ 8904(a). Appellant contends that the statute only applies to a vessel that is actually towing. His contention is without merit.

46 U.S.C. § 8904(a) states, in pertinent part,

> A towing vessel that is at least 26 feet in length . . . shall be operated by an individual licensed by the Secretary . . .

"Towing vessel" is defined as a commercial vessel "engaged in or intending to engage in the service of pulling, pushing, or hauling alongside, or any combination of pulling, pushing, or hauling alongside." 46 U.S.C. § 2101(40). The plain language of neither the present statutory definition nor its predecessors works to limit its reach to vessels actually towing. Rather, the statute's language refers to vessels "engaged in or intending to engage in **the service of**" towing [emphasis added]. I will not regard this additional language as superfluous. Based on the statute's plain language, and absent any indication of other meaning in the legislative history, I conclude that Congress intended commercial vessels in the business of towing to be considered towing vessels within the meaning of the statute, whether or not actually engaged in pulling, pushing or towing alongside. Here, the M/V SEA VIKING was returning to Seattle from a towing job in Cherry Point, crewed appropriately for towing, and operated by a towing company. She was in the service of towing and thus within the ambit of 46 U.S.C. § 8904.

II

Appellant next contends that his rights of due process were violated by placing him in the position of having to violate one of two Coast Guard regulations so he could go to the head. I disagree.

As discussed supra, 46 U.S.C. § 8904(a) requires certain towing vessels to be operated by persons with licenses.

46 U.S.C. § 8104(h) prohibits such persons from working more than 12 hours in any 24 hour period, except in an emergency. The purpose of each of these statutory provisions is to promote towing vessel safety. H. Rep. No. 125, 92nd. Cong., 1st Sess.

1-4. Appellant contends that, where only two operators are provided, it is impossible to answer a call of nature without violating one of the two statutory provisions. Congress, however, has prescribed only minimum safe operating requirements and has not dictated how those requirements are to be satisfied. Appellant has not pointed to any evidence supporting his allegations that the two statutes cannot both be satisfied. As I have previously held, a licensed operator's temporary absence from the wheelhouse of a towing vessel is not in every case an absolute violation of 46 U.S.C. § 405(b)(2) (or its successor,

§ 8904) because the mere absence might not constitute relinquishment of "actual direction and control" over the vessel. Appeal Decision 2058 (SEARS).

> If the circumstances are such that an unlicensed crew member can temporarily steer the vessel, without any appreciable increase in risk to its safe navigation then the licensed operator may momentarily leave the wheel house (after giving appropriate instructions to the crewman) and still maintain "actual direction and control." Thus, where the course is straight, the visibility good, and the traffic sparse, the licensed operator might allow an unlicensed mate to take the wheel for training purposes. And where the proven navigational competence of the crewmember is high, the licensed operator might briefly leave the wheelhouse and still maintain actual control of the vessel. Id.

The SEARS example is very different from the present case. The risks to safe navigation rose on all sides. This was plainly

a close-quarters situation. D&O at 9. Even so, Appellant left the wheelhouse with the autopilot engaged. D&O at 8. Appellant, in the head, was unable to perceive either course changes or the rapidly closing distance between the vessels. The fact that Appellant was absent from the wheelhouse for only about 3 minutes, and that the vessels collided in that time, only makes it plainer that the risks were high and getting worse. Finally, the navigational competence of the deckhand cannot be described as high: oblivious to the apparent risks, he went to the rear of the wheelhouse to look at a chart.

Furthermore, Congress has acted to shield the individual towboat operator from fear of violating § 8104(h) by limiting its application to those in management positions. 46 U.S.C.

§ 8104(j) specifically establishes penalties for violations of

§ 8104(h) only against owners, charterers or managing operators of vessels, not against the seaman affected.

III

Appellant next contends that his rights of due process were violated by the nature of the Administrative Law Judge's interrogation. I disagree.

The Administrative Law Judge enjoys wide discretion over the conduct of the hearing, and has a duty to bring out all relevant and material facts. Appeal Decisions 2321 (HARRIS), 2284 (BRAHN). A witness on the stand may be questioned at any time by the Administrative Law Judge. 46 C.F.R. § 5.535(a). In this case, the record shows that while the Administrative Law Judge

asked questions and sought clarifications throughout the proceeding, there is no indication of bias, prejudice or partiality on his part. The record indicates nothing but the Administrative Law Judge's desire to amass a proper and accurate record upon which to base his decision. His no-nonsense approach to the matter was applied even-handedly to witnesses for both sides and certainly did not approach error. This basis of appeal is without merit.

IV

Appellant next contends that he was denied due process by the Coast Guard's delay in charging Appellant, scheduling the hearing, and not timely deposing Mr. Michael Frederickson, helmsman of the F/V LEVIATHAN at the time of the collision. I disagree.

A

The charge and specifications in this case were brought well within the three year limit set by regulation. 46 C.F.R.

§ 5.55(a)(3). The F/V LEVIATHAN sank on March 20, 1992. The Notice of Hearing and Charge Sheet was served on Appellant on

May 6, 1992, scheduling the hearing for July 23, 1992. Following a prehearing conference on July 23, 1992, the hearing was held on October 20-21, 1992. The Administrative Law Judge rendered an oral Order on November 19, 1992. From the date of the collision which gave rise to the charges in this case, the entire proceeding against Appellant's license was completed within seven months. Thus, there was no regulatory violation.

B

Appellant's assertion of delay by the Coast Guard in charging Appellant may be fairly construed as invoking the venerable doctrine of laches. The laches doctrine may be applied in these proceedings when there has been an inexcusable delay in commencing an action and prejudice to the Appellant as a result of that delay. Appeal Decisions 2385 (CAIN), 2270 (HEBERT), 2253 (KIELY), 1382 (LIBBY).

Inexcusable delay may be found where the record shows intentional misconduct or oppressive design by the government. Appeal Decisions 2385 (CAIN) et al., supra. In this case, Appellant has pointed to nothing in the record that would lead me to conclude that there was inexcusable delay, by reason of intentional misconduct, oppressive design, or any other reason, on behalf of the government. That Appellant was unable to locate Mr. Frederickson for a deposition is insufficient to establish oppressive design by the Coast Guard in timing the charges and hearing. Appellant asserts that the Coast Guard was aware that Mr. Frederickson intended to leave the country at some time prior to the scheduled hearing in the instant case. That assertion is unsupported in the record. Thus, there is no evidence of prejudice to Appellant arising from any delay on the part of the Coast Guard. A claim of laches must fail.

C

Appellant also erroneously asserts that the Coast Guard violated its own policy concerning this issue. I agree with Appellant that at one time it was Coast Guard policy, as

expressed in the Marine Safety Manual (MSM), to attempt to commence a hearing and depose the witness if the Coast Guard became aware that a witness was not going to be available to testify. MSM, Vol. 5, Section 71-7-45 (1980). However, as also noted by Appellant, that policy has been superceded and is no longer in effect. See MSM, Commandant Instruction M16000.10, §§ 2.F. & 2.B.

Even if the prior policy were still in effect, Appellant's argument misses its mark. The record contains no evidence that the Coast Guard knew Mr. Frederickson was about to leave the country. Nor is there evidence to suggest that the Coast Guard intended to call Mr. Frederickson as a witness. This assertion of error is without merit. See generally Appeal Decision 2064 (WOOD).

V

Appellant next contends that he was denied due process when the Administrative Law Judge refused to admit into evidence a deposition of Mr. Frederickson.

The substance of Mr. Frederickson's testimony relates only to the specifications of misconduct based on violations of the Rules of the Road. Appellant's Memorandum in support of Appeal at 12. Mr. Frederickson's possible testimony is irrelevant to the specification concerned with relinquishing control of the M/V SEA VIKING to Mr. Webb. In view of my action with regard to the second and third specifications of the charge, infra, there is no need to reach this argument on appeal and I, therefore, decline to do so.

VI

Appellant next contends that the Coast Guard provided no credible evidence or testimony that he failed to take adequate precautions in an overtaking situation in violation of 33 U.S.C. § 1602, Rule 13. I agree.

Once having relinquished direction and control of the M/V SEA VIKING to Mr. Webb, Appellant was no longer responsible for the M/V SEA VIKING's safe navigation. It is this cessation of responsibility that distinguishes the operator's license from that of a Master. An operator is subject to charges for professional activities peculiar to his licensed status solely for the period during which he is directing and controlling the vessel. Appeal Decision 2292 (COLE). In COLE, as here, I held that an operator who relinquished direction and control to an unlicensed person was liable for misconduct. However, having relinquished direction and control of the vessel, Cole was held not liable for a subsequent violation of failing to post a proper lookout at the time of a subsequent collision.

The operator of an uninspected towing vessel is responsible for the safe operation of that vessel during the time that he is on watch, including ensuring that the vessel is in both a safe and a legal condition when he relinquishes direction and control. Appeal Decision 2387 (BARRIOS). An operator is responsible, thus, for Rules of the Road violations occurring while he is in the process of relinquishing control of the vessel.

The record in this case does not support a contention that a violation of Rule 13 was complete before the time Appellant

relinquished control to Webb. Consequently this specification must fail.

VII

Appellant next contends that the Coast Guard failed to provide credible evidence or testimony that Appellant "failed to take early and substantial action to keep clear" of the

F/V LEVIATHAN in violation of 33 U.S.C. § 1602, Rule 16. I agree.

The record indicates that, at the time Appellant relinquished control to Webb, any number of options remained that might have prevented collision. At the time Appellant left the bridge, the distance to the F/V LEVIATHAN was 100 - 250 yards. D & O at 9, Supplemental Stipulation 4. Appellant had "sufficient maneuvering room" (to overtake the F/V LEVIATHAN) without crossing into the traffic separation zone. D & O at 10, Ultimate Finding of Fact 8. Based on these findings alone, there was time for Appellant or Webb to have heaved to, slowed down, or otherwise altered the relative positions of the vessels. A completed violation of Rule 16 is inconsistent with these facts and, therefore, is not supported by the record as a whole.

To the extent that either alleged violation of the Rules of the Road was already taking form at the time Appellant relinquished control, they may be considered (as in this case) as factors in aggravation of the initial misconduct of relinquishing control of the vessel. Otherwise, for the reasons stated above, the specification must fail.

VIII

Appellant makes a bald assertion that the Administrative Law Judge erred in not presuming that Mr. Frederickson, apparently the helmsman of the F/V LEVIATHAN, was intoxicated at the time of the incident. Appellant, however, offers no legal basis for this claim, nor does the record offer it any support. His assertion is without merit.

IX

Appellant contends that the Administrative Law Judge violated Coast Guard regulations and due process by subpoenaing Appellant's employment record and considering it. While it may be that 46 C.F.R. § 5.565 serves to limit the scope of the Administrative Law Judge's subpoena powers, I decline to consider that possibility here.

Whether error or not, this action by the Administrative Law Judge was harmless. The employment record was not subpoenaed until after the Administrative Law Judge made his decision that the charge and its supporting specifications were proved. To the extent that the record was considered at all, it appears to have been considered in mitigation rather than in aggravation. Tr. of 19 Nov. 1992 at 13-15. I conclude that no prejudice to Appellant resulted. Consequently, there is no need to decide whether such a subpoena constitutes error.

X

Appellant contends that the Administrative Law Judge erred in issuing an excessive penalty. I disagree.

Sanctions imposed by an Administrative Law Judge are exclusively within his discretion unless obviously excessive or an abuse of discretion. Appeal Decision 2450 (FREDERICKS), aff'd, sub nom. Commandant v. Fredericks, NTSB Order EM-129; Appeal Decision 2414 (HOLLOWELL). The Appellant has made no such showing here. It is well-established that the Administrative Law Judge is not bound by the range of appropriate orders found in

46 C.F.R. § 5.569(d). Appeal Decision 2423 (WESSELS).

During the hearing, counsel for Appellant urged the Administrative Law Judge to consider all the specifications as fitting under the Type of Offense heading of "Failure to comply with U.S. law or regulations." Tr. of 19 Nov. 1992 at 16-18. The Range of Order indicated for that type of offense is 1-3 months' suspension. 46 C.F.R. § 5.569(d). Contrary to the implication of counsel for Appellant (Tr. of 19 Nov. 1992 at 16), I consider Specification 1 to be in the nature of a failure to perform a duty related to vessel safety, or alternatively, improper performance of duties related to vessel safety, namely, ensuring a qualified relief at the con, for which the suggested range of orders in Table 5.569 is 2-6 months' suspension. Therefore, I find that the sanction imposed by the Administrative Law Judge, namely, suspension to correspond with the approximately 4 months that Appellant had already deposited his license, together with a further 3 months' suspension on 12 months' probation, was neither excessive nor an abuse of discretion under the circumstances. In so finding, I am mindful that on appeal I have decided to dismiss the second and third

specifications of the Misconduct charge. Nevertheless, as I discussed under Section VII, the first specification is aggravated by the facts and findings in the record which supported the second and third specifications. Consequently, I find no reason to disturb the sanction imposed.

XI

Appellant contends that the Administrative Law Judge erred in admitting in evidence Coast Guard Exhibit A, a Coast Guard Law Bulletin.

It is settled in these proceedings that, absent clear error, a failure to object to admission of the evidence at the hearing waives the issue on appeal. 46 C.F.R. § 5.701(b); Appeal Decision 2463 (DAVIS). Appellant did not object to admission of this document at the hearing. (Tr. at 34-35). Appellant offers no evidence of clear error, nor is any apparent from my review of the record. Therefore, this issue will not be addressed on appeal.

XII

Appellant next contends that the Administrative Law Judge erred in admitting Coast Guard Exhibit B, the drug screening test of Mr. Frederickson, which was allegedly not taken in a timely fashion in accordance with Coast Guard regulations. I disagree.

Coast Guard regulations call for persons required to submit to chemical testing to provide the specimens as soon as practicable. 46 C.F.R. § 4.06-10. At the hearing, Appellant

objected to the relevance of a chemical test taken six days after the incident. However, the circumstances surrounding the chemical testing of Mr. Frederickson were not brought out at the hearing. The mere fact that the test was not conducted until several days after the collision does not make the test results inadmissible per se. In any case, this drug test was only relevant to specifications two and three. In light of my disposition of those specifications, this basis of appeal avails Appellant nothing.

XIII

Appellant asserts that the Administrative Law Judge erred in not allowing Respondent to cross-examine David Olsen, the owner of the F/V LEVIATHAN, regarding his bias and potential interest in the outcome of the Coast Guard hearing. Tr. at 188-191. I disagree.

The Administrative Law Judge was acting within his discretion when he limited the cross-examination by Appellant's attorney to aspects of the event in question. Mr. Olsen's possible bias was apparent from the fact of the sinking of Mr. Olsen's boat. Furthermore, the Administrative Law Judge permitted counsel to establish that a civil claim was pending. Mr. Olsen's affirmative responses sufficed to show his potential interest in the outcome of the proceeding. Proper weight to be given witness testimony in light of bias and self-interest is solely the province of the Administrative Law Judge. Appeal Decision 2465 (O'CONNELL).

In any case, and as with the previous basis for appeal, in light of my disposition of specifications two and three, this basis of appeal avails Appellant nothing. Mr. Olsen's testimony, and thus his bias (if any), was irrelevant to the first specification.

XIV

Finally, Appellant contends that the Administrative Law Judge erred in failing to take judicial notice of the magnetic effect of the M/V SEA VIKING's hull upon the F/V LEVIATHAN's magnetic compass. I disagree.

Appellant relies on a case in which the court found that it was likely that the unexpected, last minute turn of a fishing boat into a freighter was caused by the attraction of the magnet in its auto-pilot to the freighter. Slobodna Plovidba v. King, 688 F.Supp. 1226 (W.D.Mich. 1988).

The Administrative Law Judge was not obliged to consider a case that differed in several respects from the one at hand. In Slobodna Plovidba, there were eyewitnesses aboard the overtaking vessel who saw the fishing vessel make a sharp turn towards their vessel. In the case at hand, there is no evidence that anyone on either the F/V LEVIATHAN or the M/V SEA VIKING observed a course change by the F/V LEVIATHAN immediately prior to the collision. Evidence given by Mr. Webb, the unlicensed crewmember aboard the M/V SEA VIKING, that the F/V LEVIATHAN had a slight left bearing drift, indicated that the two boats were closing on each other, but there is simply no evidence in the record that this was due

to the effect of the M/V SEA VIKING on the F/V LEVIATHAN's magnetic compass.

I note that the M/V JABLANICA, the overtaking freighter in Slobodna Plovidba, was 622 feet in length and 17,996 gross tons. The M/V SEA VIKING, by contrast, is 118.7 feet long and 197 gross tons. Clearly the magnetic effect of a 17,996 gross ton vessel is more significant than that of a 197 gross ton vessel. Given these differences, and the fact that no other evidence is offered to support Appellant's assertion, it was reasonable for the Administrative Law Judge to decline to rely upon this possibility in his decision.

CONCLUSION

Except as modified herein, the findings and conclusions of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable law and regulations. The order is not unduly severe.

ORDER

The second and third specifications under the charge of misconduct are DISMISSED. As modified herein, the findings of the Administrative Law Judge with regard to the first

specification under the charge of misconduct are AFFIRMED. The order of the Administrative Law Judge is AFFIRMED.

A. E. HENN

Vice Admiral, U.S. Coast Guard

Vice Commandant

Signed at Washington, D.C., this 2nd day of May, 1995.

WILLIAMS
#]